Supreme Court, U. S.
FILED
NOV 29 1980
MICHAEL RODAK, JR., CLERK

80-869

No. _____

In The Supreme Court of the United States
OCTOBER TERM, 1980

DON HOTT, PETITIONER

vs.

STATE OF INDIANA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MAX E. HOBBS
Attorney for Petitioner
1010 Lincoln Bank Tower
Fort Wayne, Indiana 46802
Telephone: (219) 424-5114

QUESTIONS PRESENTED FOR REVIEW

The defendant, petitioner herein, was convicted on two counts of making obscene telephone calls, one to the Chief of Police and one to the County Prosecutor. The questions for review arising from the facts of the case are:

1. Whether the definition of obscenity in the Indiana Statute was calibrated precisely to particularly describe the form of sexual expression sought to be suppressed.

2. Whether the defendant's conduct was obscene or indecent within the meaning of the term in the statute.

3. Whether the ruling of the Indiana Court of Appeals that defendant was in ". . . nonconformance with accepted standards of morality." is in conflict with applicable decisions of this Court.

4. Whether the terms "obscene" and "indecent" have equivalent meanings in the context of this case.

5. Whether telephone calls to a Chief of Police and County Prosecutor constitutes such an invasion of privacy as to remove such calls from the free speech provisions of the First Amendment to the United States Constitution.

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Manual Enterprises, Inc. v. Day, (1962) 370 US 478, 82 Sup. Ct. 1432, 8 L Ed 2d 639
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Roth v. U.S., (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct. 1304
State v. Jackson, (1960) 224 Ore. 337, 356 Pac. 2d 497
Swearingen v. U.S., (1896) 161 US 446, 450-451, 16 Sup. Ct. 562, 40 L Ed 765
18 U.S.C. §1464
United States v. Simpson, (1977) 561 Fed. 2d 53
U.S. v. Twelve Two-Hundred-Foot Reels of Super Eight Millimeter Film, (1973) 413 US 123, 130, 93 Sup. Ct. 2665, 37 L Ed 2d 500

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals of the State of Indiana, First District, dated February 19, 1980, No. 2-878 A 297, reported in 400 NE 2d 206.

Order of the Indiana Supreme Court denying transfer entered September 4, 1980, No. 2-878 A 297, dissent of Justice DeBruler reported in 409 NE 2d 1082.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. Petitioner was found guilty of two counts of obscene telephone calls and sentenced in the Huntington County Court, Huntington, Indiana on March 8, 1978.

2. The Supreme Court of Indiana denied transfer on September 4, 1980

3. Jurisdiction is invoked under the provisions of 28 USC §1257(3).

THE CONSTITUTIONAL PROVISIONS AND STATUTE WHICH THE CASE INVOLVES

Constitution of the United States, Amendment 1.

> "Religious and political freedom. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Constitution of the United States, Amendment 14, Section 1.

> "Citizenship — Due process of law — Equal protection. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Indiana Code §35-30-9-1

> "Whoever, by means of a telephone,

(a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;

(b) or makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, molest or harass any person at the called number;

(c) or makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number;

(d) or makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number;

(e) or knowingly permits any telephone under his control to be used for any purpose prohibited by this section, shall be fined not more than five hundred dollars ($500) or imprisoned for any term not exceeding six (6) months, or both: Provided, That the use of a telephone facility between the points of origin and reception. Any offense committed under this section is a continuing offense and shall be deemed to have been committed at either the place of origin or the place of reception. (Acts 1961, ch. 249, §1, p. 576; 1971, P.L. 472, §1, p. 2122.)"

STATEMENT OF THE CASE

On December 21, 1976, around 11:00 P.M., the Chief of Police of Huntington, Indiana received a telephone call at his home. A male voice identified himself as Don Hott, the petitioner. The petitioner had asked the Chief to go down and arrest a certain Sergeant Ott, who was a sergeant on the third trick. The Chief told Hott that he didn't want to talk to him, and the Chief testified that Hott then said "Fuck you. You talk to me if I want you to." The Chief then said that he didn't talk to anybody he didn't want to and then Hott said "Fuck you, you no good, cock-sucking son-of-a-bitch." The Chief then hung up. These events resulted in Count 1 of a criminal information brought against Hott.

Shortly after the call to the Chief of Police, Hott called the Prosecuting Attorney for Huntington County, Indiana at his home. Hott again identified himself over the phone. Hott wanted the Prosecutor to get an arrest warrant for the Chief of Police. The Prosecutor testified that "He called me a son-of-a-bitch, the only words of that kind that he used." The call to the

Prosecutor gave rise to a second count in the criminal information against Hott.

Both counts charged Hott with the violation of Indiana Code §35-30-9-1(a).

Subsection (a) provides: "Whoever, by means of a telephone,

> (a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;
>
> . . . shall be fined not more than five hundred dollars ($500) or imprisoned for any term not exceeding six (6) months, or both . . . ."

The two counts were tried to the Court without a jury. The Judge of the Huntington County Court found Hott guilty on both counts of making obscene telephone calls and sentenced him to concurrent sentences of 180 days on the Indiana State Farm and a $500.00 fine on each of the counts.

Federal questions were raised at several points in the proceedings:

(1) A motion for a finding in favor of the defendant was made at the close of the State's evidence in the trial court. The Constitutional issues were raised. The Court over-ruled the motion on the record at the close of the trial (R. 5) in the following order:

> "Defendant in person and by Attorney. State by Jos. Northrop. State Makes opening statement. Def makes opening statement. State presents evidence and rests. Def moves for a direct finding of Not Guilty, def's motion for directed finding overruled. Def presents evidence and rests. State presents rebuttal evidence. State makes closing argument. Def makes closing argument. Court hears and considers evidence and argument of counsel. Count 1 Found Guilty $500.00 + court costs 180 days Indiana State Farm. Count 2 Found Guilty $500.00 + court costs 180 days Indiana State Farm. Days to be served concurrently. Appeal bond set at $2500 cash or surety."

(2) In the Motion to Correct Errors which reads in part as follows:

> "The finding of guilty by the Court is not supported by sufficient evidence upon all the necessary elements of the offense charged and is contrary to the evidence, and further, the finding of guilty is contrary to law in the following particulars:

A. The record is totally lacking in any evidence to show that the defendant, by means of a telephone, made any comment, request, suggestion or proposal which was obscene, lewd, lascivious, filthy or indecent.

B. The Court applied a different standard of proof for what the Court termed "indecent" language than it applied to the term "obscene" language. The law provides that the terms obscene, lewd, lascivious, filthy or indecent as used in the statute, under which the defendant was charged, have the same meaning.

C. There was no testimony to support the finding of indecent or obscene conduct for the reason that there was absolutely no testimony that the communication of the defendant had as its predominant appeal a prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, nor was there evidence that it went substantially beyond customary limits of candor in description or representation of such matters.

D. The conduct of the defendant was protected under the free speech provisions of the First Amendment of the Constitution of the United States."

(3) In the Petition for Rehearing in the Indiana Court of Appeals and the Petition to Transfer in the Supreme Court of Indiana, the pertinent parts of which are identical and are as follows:

"4. The opinion of the Court of Appeals is in error in that:

A. The opinion of the Court of Appeals contravenes rulings of the United States Supreme Court in *Manual Enterprises, Inc. v. Day*, (1962) 370 U.S. 478, 82 Sup. Ct. 1432, 8 L. Ed. 2d 639; *Roth v. U.S.*, (1957) 354 U.S. 476, 1 L.Ed. 2d 1498, 77 Sup. Ct. 1304; *U.S. v. Twelve Two-Hundred-Foot Reels of Super Eight Millimeter Film*, (1973) 413 U.S. 123, 130, 93 Sup. Ct. 2665, 37 L.Ed. 2d 500; *Miller v. California*, (1973) 413 U.S. 15; the opinion of the Court also contravenes the precedent established in other jurisdictions. *United States v. Simpson*, (1977) 561 Fed. 2d 53; *Flying Eagle Publications v. U.S.*, (1st CCA 1960) 273 Fed. 2d 799; *Connecticut v. Anonymous*, (1978) 377 Atl. 2d 1342.

B. The opinion of the Court of Appeals erroneously decides a new question of law so far as the Courts of Indiana are concerned, in that it interprets Indiana Code

§35-30-9-1(a) in a fashion inconsistent with the foregoing opinions of the United States Supreme Court and other jurisdictions.

C. The Court affirmed the trial court on the grounds that the defendant was in ' . . .nonconformance with accepted standards of morality.' Neither the Courts nor the Legislature of Indiana have established what could be called 'accepted standards of morality' to gauge defendant's conduct. The ruling was erroneous in that the United States Supreme Court has declared that such proscribed conduct must be calibrated by precise statutes. *Miller v. California*, (1973) 413 U.S. 15.

D. The State of Indiana, during the pendancy of this cause, has repealed I.C. 35-30-9-1 and substituted therefor I.C. 35-45-2-2 in an obvious attempt to conform to the above cited decision of the United States Supreme Court. The State of Indiana has recognized the constitutional questions which the Court of Appeals has ignored.

E. The opinion of the Court is based entirely upon one case, *F.C.C. vs. Pacifica Foundation*, (1978) 438 U.S. 726, 98 Sup. Ct. 3026. That case specifically does not proscribe indecent language in any other context than administrative sanctions relating to the specific broadcast which was before the F.C.C. in the Court. This Court has misinterpreted the extent of that Supreme Court decision.

F. The Court held that calling a Chief of Police and a Prosecuting Attorney at their homes was an invasion of privacy which removes constitutional protections. The holding injected an entirely new issue which was not raised in the Court below or in the briefs filed by the State. The finding was erroneous in that both a Chief of Police and a Prosecuting Attorney are public officers, on duty 24 hours a day and subject to calls of citizens whether they be meritorious or not."

ARGUMENT

In the original informations which were filed in the trial court, the only citation was generally to Indiana Code §35-30-9-1, with no reference to any of the five subsections under that Section. After a Motion to Dismiss was filed the State filed an Amended Information in two counts charging the

defendant with a violation of Indiana Code §35-30-9-1(a). The State therefore had two shots at the charge against Hott and then definitely and consciously charged him quite precisely with making a " . . . obscene, lewd, lascivious, filthy or indecent; . . . " telephone call. Hott was not charged with making annoying, abusive, threatening or harrassing phone calls.

The first count of the information involved a telephone call to the Chief of Police of Huntington, Indiana. The Chief's testimony was that the telephone call irritated and angered him (Tr. 59, L. 18); that he felt that the language used was indecent (Tr. 62, L. 27-30); and when asked what his reaction was to the phone call, he stated "I hung up on him." The Chief also said that he was upset and angered. He said that he felt the language was indecent.

The second count involved a call to the Prosecutor of Huntington County. The only language the Prosecutor complained of were the words "son-of-a-bitch." The Prosecutor said that he was angered and upset by the words and thought that the words were indecent. When asked if he was sexually aroused by the call, he said, "I was afraid, not aroused."

The strongest language the complaining witnesses used regarding the language used by Hott was that they felt the words used were "indecent."

The trial judge commented that he thought that the language was not lewd and lascivious, but that it was indecent and therefore obscene. The trial judge apparently felt that each of the terms contained in the statute could stand individually, and therefore based his decision on what he felt was "indecent."

It is the contention of the petitioner that to be found guilty under subsection (a) of the Indiana statue, the defendant's conduct must have been obscene. It is the further contention of the petitioner that all of the words contained in subsection (a) of the statute are merged under the doctrine of *Ejusdem Generis* into the term obscene.

In *United States v. Simpson*, 561 Fed. 2d 53 (7th CCA-1977), the 7th Circuit has said that all the terms used in the Indiana statute, that is, indecent, filthy, vile, obscene, lewd and lascivious, all have a common meaning.

In the *Simpson* case, the defendant was convicted of a violation of 18 USC §1464 which makes it an offense to "utter . . . obscene, indecent, or profane language by means of radio communication." He was convicted when the jury found that the language was indecent but not obscene. This is similar to the situation we have in this case.

The Court said that other cases have held that the words "indecent, filthy or vile" used together are qualified by the words "obscene, lewd and lascivious" which were part of the statute and that all of the words refer to matters of sex and connote prurient appeal. *Flying Eagle Publications v. U.S.*, (1st CCA 1960) 273 Fed. 2d 799; *Swearingen v. U.S.*, (1896) 161 US 446, 450-451, 16 Sup. Ct. 562, 40 L Ed 765.

Simpson cited the case of *Manual Enterprises, Inc. v. Day*, (1962) 370 US 478, 82 Sup. Ct. 1432, 8 L Ed 2d 639, where Justice Harlan spoke of the foregoing six words as follows:

> "While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex."

Harlan went on to say that indecent material, as a result of *Roth v. U.S.*, (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct. 1304, is material which "taken as a whole appeals to the prurient interest."

The Seventh Circuit in *Simpson* says that a long history of the construction of the word "indecent" in cases under other statutes decide that it has the same meaning as the word "obscene."

The court, in *Simpson*, relied on dictum contained in *U.S. v. Twelve Two-Hundred-Foot Reels of Super Eight Millimeter Film*, (1973) 413 US 123, 130, 93 Sup. Ct. 2665, 37 L Ed 2d 500, and concludes that the term "indecent will be construed as exempting from First Amendment protection only material which appeals to the prurient interest, i.e., material that is obscene." The court, after reviewing the history of the meaning of the word indecent, concludes that it has the same meaning as the word "obscene." At 561 Fed 2d 51, page 60, therefore, we find:

> "We therefore hold that 'obscene' and 'indecent' in Section 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to the prurient interest."

All of the terms used in the offense charged here have the same meaning. They are all lumped under the single phrase

"obscenity." *If the defendant was to be found guilty as charged, then the language used must have been obscene.*

The landmark obscenity case is *Roth v. The United States*, (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct. 1304. Since this case was decided in 1957, the courts have applied to cases involving obscenity what is known as "the Roth test." That test is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

In *Roth*, the terms obscene and indecent are apparently held to mean the same thing. The court said that the terms "obscene" and "indecent" applied according to the proper standing for judging obscenity give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries fairly to administer the law.

The only modification of the *Roth* case was by the Supreme Court in 1973 in the case of *Miller v. California*, (1973) 413 US 15. The Court said that the subject of obscenity must be calibrated by precise statutes which particularly describe the form of sexual depiction sought to be suppressed. The Indiana legislature obviously reacted to the *Miller* case when it repealed the law under which the defendant was charged and substituted, therefore, Indiana Code §35-45-2-2 which became effective January 1, 1978. The new act defines an obscene message. The definition appears to be taken right from *Miller*.

Both the *Roth* case and subsequent cases have defined prurient interest as being material having a tendency to excite lustful thoughts. See also *State v. Jackson*, (1960) 224 Ore. 337, 356 Pac. 2d 497.

The Appellate Session of the Superior Court of Connecticut was called upon to rule whether "the finger" is an obscene gesture. In *Connecticut v. Anonymous*, (1978) 377 Atl. 2d 1342, the court said that while such a gesture might be a "vulgar epithet" or inherently likely to provoke violence when addressed to an ordinary citizen in a face to face confrontation, or even beyond the pale of constitutionally protected speech when directed against a particular individual or group, it was not obscene because it was not erotic in a significant way and did not appeal to prurient interest in sex or portray sex in a patently offensive way.

In the *Connecticut* case, a high school student gave "the finger" to the occupant of a police car that pulled up behind a

school bus at an intersection. The state trooper pulled the bus over and arrested the student. He was prosecuted under a Connecticut law that makes it a breach of the peace to use an "obscene gesture" in a public place with intent "to cause inconvenience, annoyance or alarm, or recklessly create a risk thereof." The anonymous youth was found guilty but the conviction was reversed on appeal.

The similarity between the *Connecticut* case and the case before the Court is certainly obvious. In the *Connecticut* case, we have a person making an offensive gesture at a police officer. In the case here, we have the defendant making offensive statements to a police officer and to a prosecutor. In both cases, the evidence was lacking in supporting a conviction for obscenity. There was nothing in the evidence at the trial of the Hott case that shows a "shameful or morbid interest in nudity, sex or excretion" and nothing that "goes substantially beyond the customary limits of candor in description or representation of such matters." In the *Connecticut* case, the policeman was angered. In our Huntington County Indiana case, the Chief of Police was upset and angered but was not sexually aroused. The Prosecutor was angered and upset but was not sexually aroused. This is supported by testimony of both men.

The Indiana Attorney General, in its brief before the Indiana Court of Appeals, relied strictly on one case, that of *Federal Communications Commission vs. Pacifica Foundation*, (1978) 438 US 726. That case was the well known George Carlin record broadcast containing references to so-called "filthy words." The Indiana Court of Appeals held that the *Pacifica* case altered all of the authorities cited by Hott in this petition. Petitioner contends that *Pacifica* case simply does not apply in this case. The Attorney General and the Indiana Courts completely ignored Justice Stevens' limited application of the *Pacifica* case. *Pacifica* had only to do with the question of F.C.C. licensing and radio broadcasting.

The Indiana Court of Appeals decision raised an entirely new issue. The Court, in its last paragraph, (see Appendix) held that to call a Chief of Police and a Prosecuting Attorney at their homes at 11:00 P.M. while they were in bed and using "indecent" language, was an invasion of a substantial interest in privacy. And therefore, the free speech protections of the First Amendment to the United States Constitution do not apply. The Court cited no precedent for this startling conclusion.

The Indiana Court of Appeals attempted to define standards of morality. Under *Miller v. California*, (1973) 413 US 15, standards of morality or conduct must be calibrated by precise statutes. The Indiana Court of Appeals in its opinion stated: "The word 'indecent' refers to nonconformance with accepted standards of morality. We hold that the words used by defendant in telephone conversations were indecent within that definition." The *Miller* case does not allow the Indiana Court of Appeals to define standards of morality. This is the province of the Legislature, with interpretation of those definitions to come by the Courts at a later time. The Indiana Court of Appeals was attempting to legislate morality.

Petitioner would further contend that the position taken by Justice DeBruler of the Indiana Supreme Court in his dissent is the correct one. DeBruler said ". . . it follows of necessity that appellant's conviction cannot stand since the manner in which appellant employed these vulgar epithets was not intended to, and, in fact, did not appeal to prurient interests and therefore could not be obscene. *Cohen v. California*, (1971) 403 U.S. 15, 91 S. Ct. 1780, 29 L.Ed. 2d 284; *Hess v. Indiana*, (1973) 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed. 2d 303. This interpretation of our statute is firmly supported by persuasive authority." (See Appendix)

The calls of Hott to the Chief of Police and the Prosecutor did not constitute violations of the statutory provision pursuant to which the charges were brought. The conviction and the subsequent decision of the Indiana Court of Appeals raise serious constitutional questions, and for these reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAX E. HOBBS
Attorney for Petitioner
1010 Lincoln Bank Tower
Fort Wayne, Indiana 46802
Telephone: (219) 424-5114

APPENDIX

JUDGMENT OF THE TRIAL COURT

HUNTINGTON COUNTY COURT
CAUSE NO. CO-CR-76-3281

"Defendant in person and by Attorney. State by Jos. Northrop. State makes opening statement. Def makes opening statement. State presents evidence and rests. Def moves for a direct finding of Not Guilty, def's motion for directed finding overruled. Def presents evidence and rests. State presents rebuttal evidence. State makes closing argument. Def makes closing argument. Court hears and considers evidence and argument of counsel. Count 1 Found Guilty $500.00 + court costs 180 days Indiana State Farm. Count 2 Found Guilty $500.00 + court costs 180 days Indiana State Farm. Days to be served concurrently. Appeal bond set at $2500 cash or surety."

DECISION OF THE COURT OF APPEALS OF INDIANA FIRST DISTRICT

DON HOTT,	)	
	)	
Defendant-Appellant,	)	
	)	
-v-	)	NO. 2-878 A 297
	)	
STATE OF INDIANA,	)	
	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE HUNTINGTON COUNTY COURT
The Honorable Gale Jones, Judge

NEAL, J.

This is an appeal by defendant-appellant Don Hott from the Huntington County Court from a conviction of making an indecent telephone call.

We affirm.

On December 21, 1976, defendant, at 11:00 p.m., made a telephone call to the chief of police of Huntington, which call awakened the chief from his slumber. Defendant, in an irritated and aggravated way, requested the chief to go and arrest the duty sergeant for some grievance. The chief refused, and thereupon defendant called him names in vile gutter language, impugning canine ancestry with tendencies *en fellatio*, the exactitude of which is unnecessary for this opinion. Minutes later defendant called the prosecuting attorney at his home, also awakening him from his sleep. This conversation was similar to the one with the chief, but here, the words used simply impugned canine ancestry.

The defendant was charged in two counts, one for each telephone call, with committing offenses under IND. CODE 35-30-9-1(a), since repealed, which provides, in part, as follows:

> *"Whoever, by means of a telephone, (a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;*
>
> * * *
>
> *shall be fined not more than five hundred dollars ($500) or imprisoned for any term not exceeding six (6) months, or both. . ." (Emphasis added.)*

In a trial before the court the defendant was convicted on both counts.

The questions presented for review are constitutional arguments involving the definition of "obscene, lewd, lascivious, filthy *or* indecent" language, and whether the conduct is protected under the free speech provisions of the First Amendment to the United States Constitution.

Defendant argues that when a series of words begins with a particularly defined word, all of those words which follow are included in the definition of the original word, and that under this basic rule, the terms "lewd, lascivious, filthy or indecent" are combined into the word "obscene" in the statute under consideration. Defendant proceeds from that point to develop his argument by citing the case of *United States v. Simpson*, 561 Fed. 2d 53 (7th Cir. 1977). There the court held that the terms

indecent, filthy, vile, obscene, lewd, and lascivious, all have common meaning, that is obscene. Defendant further advances his argument by noting that *Simpson* holds that obscene refers to matters of sex and connotes prurient appeal.

Defendant cites *Roth v. United States*, (1957) 354 U.S. 476, 489, as the standard to determine obscenity, that test being "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

In summary, defendant argues that there was nothing in the evidence to show defendant's conduct was erotic in nature, and it did not sexually arouse the prosecuting attorney or the chief, nor did it appeal to the prurient interest, and therefore it was not obscene.

Authority exists as to examples of conduct that were determined by the Supreme Court not to be obscene within this definition. In *Cohen v. California*, (1971) 403 U.S. 15, wearing a jacket with a vulgar expression opposing the draft in the corridors of a courthouse was not obscene. In *Hess v. Indiana*, (1973) 414 U.S. 105, vulgar language in a group in an anti-war rally was not obscene. In *Simpson*, *supra*, a broadcast on a C.B. radio with explicit reference to sexual activities, sexual organs, and abusive epithets directed at other ham operators was not obscene.

The case of *Federal Communications Commission v. Pacifica Foundation*, (1978) 438 U.S. 726, alters the authorities cited by defendant. In that case the defendant broadcast a satiric monologue of "filthy words." The F.C.C. statute contains proscriptions against the broadcast of "obscene, indecent, *or* profane" material.[1] Pacifica Foundation's claim that the broadcast was not indecent within the meaning of the statute was based entirely upon the absence of prurient appeal. The court noted that the terms were written in the disjunctive, implying that each has a separate meaning. It held that prurient appeal is an element of the obscene but the normal definition of indecent merely refers to nonconformance with accepted standards of morality. Therefore, the language used in the broadcast was indecent within the meaning of the statute.

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[1]18 U.S.C. §1464 (1976).

The *Pacifica Foundation* court, citing *Cohen*, *supra*, in its comments, made a further distinction that whether a communication is protected under the First Amendment depends also upon where and how it is made. It noted that governmental entities may constitutionally act to prohibit unwanted intrusions into the privacy of the home of unwelcome views and ideas, which include harrassing telephone calls, and the use of obscene or profane language on the telephone, the natural consequence of which is to abuse the hearer. Such conduct, while it may be protected elsewhere, will not be protected where there is a showing that substantial privacy interests are being invaded.

We observe that IND. CODE 35-30-9-1(a) contains the words "obscene, lewd, lascivious, filthy *or* indecent" (emphasis added) in the disjunctive, which, according to the authority of *Pacifica Foundation*, *supra*, implies a separate meaning to each. The word "indecent" refers to nonconformance with accepted standards of morality. We hold that the words used by the defendant in the telephone conversation were indecent within that definition. We further hold that the defendant's conduct in calling the chief of police and the prosecuting attorney at their homes at 11:00 p.m. while they were in bed and in using indecent language was an invasion of a substantial interest in privacy, and was not otherwise protected by the First Amendment.

For the above reasons, this cause is affirmed.

Affirmed.

ROBERTSON, P. J. and RATLIFF, J. CONCUR.

RULING OF THE INDIANA SUPREME COURT

"You are hereby notified that the Supreme Court has on this day denied Appellant's Petition to Transfer without opinion. Givan, C. J. DeBruler, J., votes to grant transfer with opinion."

DISSENT OF JUSTICE DeBRULER

DeBRULER, J. — Dissenting

Appellant was charged and convicted of making two obscene telephone calls in violation of Ind. Code §35-30-9-1(a) (repealed effective January 1, 1978). He received concurrent sentences of 180 days on the State Farm and a $500 fine on two counts.

The evidence given by the Chief of Police of Huntington, Indiana showed that he received a phone call late at night after he had retired. Appellant identified himself as the caller and complained about some things he had heard that the local police were saying about him. He said that he had called a Sgt. Ott who would not listen to him and had hung up on him. Appellant was angry and cursed during the conversation and when the Chief told him he did not want to listen anymore, the appellant said "Fuck you, you no-good cock-sucking son-of-a-bitch." Appellant then made the second phone call to the prosecutor of Huntington County, threatened him and in the course of the conversation called him a son-of-a-bitch.

Indiana Code §35-30-9-1(a) and (b) provide:

> "Whoever, by means of a telephone,
>
> (a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;
>
> (b) or makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, molest or harass any person at the called number . . . ."

The charges against appellant were brought pursuant to Ind. Code §35-30-9-1, subsection (a). The Court of Appeals affirmed the convictions at 400 N.E. 2d 206, and in so doing held that appellant's language was indecent within the meaning of that term in the statute. The meaning given this term by that court is erroneous. We deal here with interpreting and applying a criminal statute. In reading it one cannot escape the realization that the perimeters of the proscription in the terms "obscene, lewd, lascivious, filthy or indecent" are obscure and caution is dictated. We are bound to interpret statutes having ambiguities of this sort so as to resolve such doubts in favor of the accused. *Adamo Wrecking Co. v. United States*, (1978) 98 S.Ct. 566; *Utley v. State*, (1972) 258 Ind. 443, 281 N.E. 2d 888; *Hutcherson v. State*, (1978) Ind. App. , 382 N.E. 2d 983. The presence of doubt here cannot be rationally questioned. Angry

cursing and vilification cannot properly be characterized as a "comment, request, suggestion or proposal." It surely is not a request, suggestion or proposal. If considered a comment, upon what was it a comment? Appellant's calls were none of those things. They were abusive attacks upon the two men by word. Their purpose was to revile. One simply cannot be comfortable in referring to them as indecent comments.

Upon reading subsection (a) it is at first apparent that the five terms, obscene, lewd, lascivious, filthy and indecent, are synonyms. When considered in this string, each term, including indecent, connotes a common meaning, and it is that meaning which the Legislature sought to refer to in inserting them in the statute. Each term refers to matters of sex and connotes prurient appeal, or to put it in the manner urged by appellant, each of these terms are used in the statute can properly be considered within the legal meaning of the term obscene. Interpreted in this manner, it follows of necessity that appellant's conviction cannot stand since the manner in which appellant employed these vulgar epithets was not intended to, and, in fact, did not appeal to prurient interests and therefore could not be obscene. *Cohen v. California*, (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 284; *Hess v. Indiana*, (1973) 414 U.S. 105 94 S.Ct. 326, 38 L.Ed. 2d 303. This interpretation of our statute is firmly supported by persuasive authority.

In *Hamling v. United States*, (1974) 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590, the Supreme Court considered the statutory string of terms, "obscene, lewd, lascivious, indecent, filthy or vile" and concluded that the term indecent there had the same meaning as "obscene". In *FCC v. Pacifica Foundation*, (1978) 98 S.Ct. 3026, relied upon by the Court of Appeals in affirming appellant's conviction, the Supreme Court considered by contrast a string of terms, "obscene, indecent or profane", and concluded that prurient appeal was not an essential component within the term indecent, and therefore in that context "obscene" and "indecent" were not equivalent terms. The court in *FCC* did not deem itself bound by *Hamling*, because *Hamling* dealt with printed matter enclosed in sealed envelopes and mailed from one person to another while the statute in *FCC* dealt with public broadcasts. Neither of these cases is, of course, binding on this Court in making a legal interpretation of an Indiana statute. Since a private telephone conversation is more

like a private written communication than it is like a public broadcast for these purposes, it is highly likely that the Supreme Court would deem itself bound by *Hamling* in interpreting an act of Congress using the language of the Indiana statute under consideration, and would find that "obscene" and "indecent" are equivalent terms having an appeal to the prurient interest as an essential element, and would reverse appellant's conviction.

To construe this Indiana statute to require proof of an appeal to prurient interest is further reinforced when subsection (a) is considered along with subsection (b). Subsection (b) prohibits telephone calls which are made with the intent to "annoy, abuse, threaten, molest or harass any person at the called number." The statute itself this distinguishes between indecent calls on the one hand and abusive, harassing and threatening calls on the other. Telephone calls made to women for sexual stimulation or gratification or to persons of both sexes to intimidate could hardly escape the categories in subsection (b). The distinction made would indicate that the term "indecent" has a narrow and special meaning. I cannot, therefore, agree with the Court of Appeals that the term "indecent" was intended in its broadest sense as referring to "nonconformance with accepted standards of morality."

Appellant's calls to the Chief and the Prosecutor did not constitute violations of the statutory provision pursuant to which the charges were brought, and his convictions should be reversed.

CERTIFICATE OF SERVICE

I, Max Edward Hobbs, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 26, 1980, I served three (3) copies of the foregoing Petition for a Writ of Certiorari by depositing the same in the United States Post Office with first class postage prepaid, addressed to Theodore L. Sendak, Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204. All parties required to be served have been served.

MAX EDWARD HOBBS
Attorney for Petitioner
1010 Lincoln Bank Tower
Fort Wayne, Indiana 46802
Telephone: (219) 424-5114